SUPREME COURT, U.S.
70-5082
Supreme Court, U.S.
FILED
AUG 30 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 6744

LAVERNE CARTER, *et al.*,
Appellants (Plaintiffs below),

v.

WAYNE STANTON, *et al.*,
Appellees (Defendants below).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIEF OF APPELLEE WAYNE STANTON

ROBERT W. GEDDES
HAROLD W. JONES
SMITH AND JONES
2470 Indiana National Bank Tower
Indianapolis, Indiana 46204
(317) 632-4402

Attorneys for Appellee Wayne Stanton

Of Counsel:
CARL J. MEYER
RHOADS, LINDER, MEYER AND BUEHL
136 East Market Street
Indianapolis, Indiana 46204
(317) 632-4402

Central Publishing Company, Inc., Indianapolis, Ind. 46206

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 6744

LAVERNE CARTER, et al.
Appellants (Plaintiffs below),

v.

WAYNE STANTON, et al.,
Appellees (Defendants below)

On Appeal From The United States District Court
For the Southern District of Indiana
Indianapolis Division

BRIEF OF APPELLEE WAYNE STANTON

ERRATUM:

Page 17, last paragraph,
"discreation" is a misprinting of discretion.

TABLE OF CONTENTS

	Page
Questions Presented	1
Statutes Involved	2
Statement	3
1. The Statutory Framework	3
2. Proceedings Below	5
3. Filing of AFDC Applications	5
4. Concerning Divorce or Separation	6
5. State Wide Practices	8
6. Concerning Six Month Period	8
7. Standards of Need	9
8. Interim Assistance Sources	9
9. Administrative Appeal	10
10. Judgment of the District Court	11
Summary of Argument	11
Argument	15
I. No Substantial Federal or Constitutional Question Involved	15
A. Regulation Valid on Its Face	15
Flexible Measures of Continued Absence	15
Uniform Standards of Need	21
B. Application of Regulation	23

TABLE OF CONTENTS—Continued

Page

No Divorce or Separation Requirement 23

C. Interim Benefit Sources 26

II. Failure to Invoke or Exhaust Administrative Remedies 28

A. The Remedies Meet the Test 28

B. Claimants Have Not Earned Federal Jurisdiction 31

III. Conclusion 34

Appendix (Statutes and Regulations) A-1

TABLE OF AUTHORITIES

Page

Cases:

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947) 31

Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951) 31

Damico v. California, 389 U.S. 416 (1967) 31, 32

Damico v. California, 2 Pov. L. Rep. ¶10,478 (N.D. Calif. 1969) 16, 19

Dandridge v. Williams, 397 U.S. 471 (1970) 14, 17, 19

Doe v. Hursh, 2 Pov. L. Rep. ¶11,753 (D. Minn. 1970) 19

Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) 33, 34

Federal Maritime Board v. Isbrandtsen, 356 U.S. 481 (1958) 21

Harmon v. Brucker, 355 U.S. 579 (1958) 12

Houghton v. Shafer, 392 U.S. 639 (1968) 31, 33

King v. Smith, 392 U.S. 309 (1968) 17, 31, 33

McNeese v. Board of Education, 373 U.S. 668 (1963).. 31

Metcalf v. Swank, 305 F.Supp. 785 (N.D. Ill. 1969) ..33, 34

Monroe v. Pape, 365 U.S. 167 (1961) 31

Shapiro v. Thompson, 394 U.S. 618 (1969) 17

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 21

Social Security Act of 1935:
§ 406(a), 42 U.S.C. 606(a) 12, 16, 21, A-14

TABLE OF AUTHORITIES—Continued

Page

Cases:—continued

Indiana Statutes Annotated:

§ 52-144 ..... 3, 28, A-8
§ 52-148 ..... 3, 28, A-8
§ 52-150 ..... 3, 28, A-9
§ 52-1241 ..... 2, 21, A-1
§ 52-1242 ..... 2, A-2
§ 52-1243 ..... 2, 27, A-3
§ 52-1244 ..... 3, A-3
§ 52-1245 ..... 3, A-6
§ 52-1246 ..... 29, A-7

Indiana Rules and Regulations:

§ 52-1244-1 ..... 3, 27, A-4

Indiana State Board of Public Welfare Regs.:

2-113 ..... 29, A-9
2-113(b) 31, A-9
2-402(b) 1, 11, 13, 15, 16, 21, A-14
2-204 ..... 3, 27, A-4

IN THE

Supreme Court of The United States

OCTOBER TERM 1970

NO. 6744

LAVERNE CARTER, *et al.*,

Appellants (Plaintiffs below),

v.

WAYNE STANTON, *et al.*,

Appellees (Defendants below).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIEF OF APPELLEE WAYNE STANTON

Wayne Stanton, defendant below, concurs in the statement of the Appellants concerning the Opinion Below.

QUESTIONS PRESENTED

1. Whether a substantial constitutional or federal question is raised by a challenge to Indiana Public Welfare Regulation 2-402(b) which uses a six-month continuous ab-

sence of a parent as a condition for granting AFDC benefits —but which also contains an exception allowing immediate benefits within that period under exceptional circumstances of need and a determination that the absence of the parent is actual and bona fide.

2. Whether the state administrative remedies were adequate, prompt and available to the claimants.

3. Whether on the record of this case the claimants should have exhausted the state administrative remedies before seeking relief in the federal court.

STATUTES INVOLVED

The defendant Stanton concurs that the statutes and the regulations listed by the claimants are among those involved in this case.

In addition, the defendant Stanton lists the following statutes and regulations which are set forth in his Appendix hereto:

(1) Indiana statute on dependent children—amount of assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, Article 72, p. 12, as amended Acts 1967, Chap. 270, § 1, p. 799 [Burns' Cumulative Pocket Supplement Vol. 10, Part 1, § 52-1241];

(2) Indiana statute on dependent children—application for assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 73, p. 12 [Burns' Indiana Statutes Annotated 1964 Repl. § 1242];

(3) Indiana statute on dependent children—investigation. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 74, p. 12 [Burns' Indiana Statutes Annotated 1964 Repl. § 52-1243];

(4) Indiana statute on dependent children—granting of assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 75, p. 12 [Burns' Indiana Statutes Annotated 1964 Repl. § 52-1244]; and Indiana State Board of Public Welfare Regulation 2-404, Burns Ind. Admin. Rules & Regs. (52-1244)-1 (1969).

(5) Indiana statute on dependent children—certificates. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 76, p. 12 [Burns' Indiana Statutes Annotated 1964 Repl. § 52-1245].

(6) Indiana statute on Township Trustee as overseer of poor. Indiana Acts 1935, Chap. 116, Article 1, p. 432 [Burns Indiana Statutes Ann. 1964 Repl. § 52-144].

(7) Indiana statute as to duties of Trustee and service to be rendered. Indiana Acts 1967, Chap. 251, Article 1, p. 655]Burns Cum. Pocket Supp., Vol. 10, Part 1, § 52-148].

(8) Indiana statute on temporary aid by Township Trustee. Indiana Acts 1935, Chap. 116, Article 7, p. 432 [Burns Indiana Statutes Ann. 1964 Repl. § 52-150].

STATEMENT

The claimants' Statement has slighted some critical facts. They are abstracted below.

1.

The Statutory Framework

In addition to the claimants' summary of the administrative framework (Appellants' Br. 5) the administrative review procedures include the following:

The county department must at once report to the state department its decision upon each AFDC application. (Appellants' App. 3a).

Upon its own motion, the state department may review any decision of the county department and may consider any application not decided by the county department within a reasonable time. (ibid).

An applicant or recipient may appeal to the state department (a) if she believes her civil or constitutional rights have been violated; or (b) if she believes that the policies of either department are not reasonable or equitable and that they affect her adversely; or (c) if any application is not acted upon by the county department within a reasonable time. (Appellants' App. 3a).

Fair hearings are expressly mandated. (Appellants' App., 3a, 5a-7a).

Prompt state department action is required on each appeal. It must immediately write the applicant fixing a date of hearing within the next three weeks, with a copy to the county department. The county departmenf must then immediately review the situation and if an adjustment is indicated must notify the appellant and the state department—all within two weeks after receipt of notice of appeal. (Appellants' Br., 4a-5a).

After the state department appeal hearing the person appealing is notified that the State Board of Public Welfare will personally review the case if so requested within the next ten days. (Appellants' App. 6a, 7a).

2.

Proceedings Below

The defendant rejects the claimants statement that the referral of AFDC applicants to the Township Trustee for interim benefits violates the Social Security Act of 1935. (App. Br. 7). The complaint below did not challenge such referrals. They should not be made a subject of challenge for the first time on appeal.

3.

Filing of AFDC Applications

With respect to the filing of AFDC applications the record discloses the following—

Of the five claimants who testified, Carter, Bowman, Enoch and Steele all admitted on cross examination that they were not denied the right to file and in fact each did file an application. (App. 121, 132, 140, 151). Claimant Hall filed an application two days after separation from her husband. (App. 162-163).

In addition to the claimants, six other applicants testified, four for the claimants and two for the defendants. Witnesses Davis, Luke and Tanner filed applications during the same month in which they claimed their spouses left home. (App. 106-107, 92, 93, 73). Witness Watkins separated from her husband in June 1970, filed an application in August and began receiving benefits the first of the next month. (App. 84). Witness Blankenbackler was not denied the right to file an application. (App. 170). Witness Smith "was given an application immediately the first day" she went to the county welfare department and was not denied the right to file. (App. 172).

Ernest McGruder—holder of a Masters Degree in social work from Indiana University, and chief supervisor for the family services division of the county welfare department—affirmed that any person expressing a desire to file an application can do so. (App. 49). Keith Carver, intake caseworker, never denied anyone the right to apply for public welfare. (App. 176). Lois Hartzler, another caseworker in the intake division of the county welfare department, never denied anybody an application and advised each person of the right to apply. (App. 187).

The defendant Wayne Stanton, for the past eleven years Director of the Marion County Department of Public Welfare, stated tht the county department accepts "an application on any individual that wishes to file an application for any of our programs." (App. 191).

4.

Concerning Divorce or Separation

Ernest McGruder, the chief supervisor, testified that there is no policy wherein one must sue for divorce or legal separation before filing an application or receiving AFDC assistance thereon. (App. 50). Keith Carver, intake caseworker, said there is no requirement for the filing of legal separation or divorce papers before filing an application for AFDC assistance. (App. 177). Lois Hartzler, caseworker, has never told an individual that she would have to file for divorce or legal separation before she could receive AFDC benefits. (App. 187). And the defendant Stanton confirmed that the county has no rule, regulation, practice or policy under which a person must file a complaint for divorce or separation in order to receive assistance or even make an application. (App. 191-192).

Within three months after their spouses allegedly left, the claimants Enoch and Hall each received AFDC assistance. Claimant Hall never filed for divorce; claimant Enoch filed at some unknown time. (App. 151, 163).

Claimant Steele joined in this suit against the defendant Stanton before applying for assistance. She filed for divorce the same month her husband departed. She was denied aid, but testified that she was living with her folks and didn't have any problems of need. (App. 139, 141, 142). Claimant Carter was denied aid. Carter signed papers to file for divorce before filing for AFDC benefits. (App. 129, 130). Claimant Bowman started receiving AFDC assistance the first part of June 1970 and did not file for divorce until approximately two months later. (App. 117, 125).

Witness Watkins started receiving AFDC benefits less than three months after she and her husband separated but never filed for divorce. (App. 184). Witness Luke allegedly started receiving welfare assistance approximately five months after filing her application. Luke filed for divorce before receiving AFDC benefits. (App. 191). Witness Davis was denied aid and testified that she filed for legal separation after filing her application for welfare assistance. (App. 107). Davis, who had separated five or six times before filing her application (App. 106), testified that filing for divorce had nothing to do with receiving any welfare benefits. (App. 111). Witness Tanner stated that she started receiving AFDC benefits approximately one month after separation and filed for divorce before applying. (App. 73). Witness Blankenbackler said that she started receiving AFDC benefits approximately two months after separation. (App. 169). Blankenbackler stated that she was not requested or required to file for

divorce or legal separation. (App. 170). Witness Smith started receiving welfare assistance approximately one month after her husband left home. (App. 171). Smith also stated that she never filed for divorce or legal separation. (App. 172).

5.

State Wide Practices

State wide practices have no place in this appeal. The record is devoid of evidence about them. The claimants failed to produce witnesses or to show that deponents were unavailable for testimony at this trial. No director of any county department except Marion was produced. And whatever depositions the claimants tendered did not receive a ruling of admissibility. Nor did the claimants call the matter to the court's attention after it was taken under advisement.

6.

Concerning Six Month Period

Chief supervisor McGruder, caseworkers Carver and Hartzler, and county director Stanton all testified that the six month period in the regulation is waived regularly. (App. 52, 176, 187, 192). Stanton said that for all persons applying for AFDC benefits where there has been a separation from the spouse, the county evaluates the need factor, the emergency and magnitude of the need, and whether the separation is of a short term, repetitive, continuous, or a common experience, as opposed to what appears to be permanent or bona fide continued absence. (App. 191).

McGruder himself makes the final determinations to disregard the six month continuous absence measure. His assistant does so in McGruder's absence. Sometimes he discusses the problem with Stanton. (App. 51)

7.

Standards of Need

Ernest McGruder testified that need is determined by a set standard for the state of Indiana. It is used state wide as to what a family of a certain size needs monetarily to maintain a standard of living comparable to decency and health. The standard is applied objectively to everyone who applies for welfare. (App. 49). Standards of need for persons separated less than six months are the same as for those separated for more than six months. (McGruder App. 51, Stanton App. 195).

Ernest McGruder also testified that in determining the person's need DPW Form 350 is used. Form 350 is a table which establishes how much a family of a certain size needs and which has a breakdown as to how much a family needs for food, clothing, fuel, utilities, etc. (App. 58). Income is also considered. (App. 58). These determinations or factors are the same for parties separated six months or less than six months. The same table is used for everyone. (App. 59).

8.

Interim Assistance Sources

Although the county department of public welfare decides on an AFDC application within thirty days, the county department is not the agency to provide instant assistance.

(Stanton, App. 195). By statute this is delegated to the Township Trustee. The Trustee carries this responsibility for the short term or first part of the need situation until there are signs of bona fide separation. (App. 204-205).

Stanton did not say that the Trustee's primary responsibility continues for the first six months of a separation.

Each named claimant who requested interim assistance from the Township Trustee received it in various forms. (App. 116, 134, 141, 148, 165). Stanton testified that there are nine Township Trustee offices in Marion County. (App. 194). Stanton further testified that he knew of no limitation on what the Township Trustee could provide and that the Township Trustee's assistance is in the form of money, food, furniture, utilities, groceries, school rentals and school lunches. (App. 194-195).

In addition to the Township Trustees, other sources for quick interim relief include Volunteers of America, Salvation Army, Red Cross, Catholic Social Services, Urban League, and many churches having welfare service departments. (App. 194-195).

9.

Administrative Appeal

None of the claimants appealed the decision of the Marion County Department of Public Welfare as to benefits received or denied by the county department. (App. 194). Claimants Carter and Bowman admitted that they were advised of their right to administratively appeal the county decision and, although represented at that time by an LSO attorney, failed to take such appeal. (App. 122, 132).

Claimant Steele filed this lawsuit before going to the welfare department for benefits. (App. 142, 143, 144).

Defendant Stanton testified that his department always advises anyone of the right to appeal the county's decision and that such appeal is scheduled within a week or two and decided in approximately two weeks thereafter. (App. 193, 197).

Witness Davis appealed the county decision to the state department of public welfare but did not appeal to the state board of public welfare. (App. 212). None of the other witnesses appealed the county decision or stated any dissatisfaction.

10.

Judgment of the District Court

The defendant Stanton concurs with that portion of the Court's amended entry on motions to dismiss as shown by the claimants on pages 10 and 11 of their Brief.

SUMMARY OF ARGUMENT

The claimants predicate their whole case on their charge that contrary to their constitutional and federal rights they were denied the right to apply for or to obtain AFDC aid during the first six months of their spouse's absence, unless they first filed for divorce or legal separation. They rest this charge upon a misunderstanding of Indiana Public Welfare Regulation 2-402(b) and its application.

And they ignore the obvious—that the regulation is not arbitrary or rigid but is flexible in meaning and application.

Proper construction of the regulation and examination of the facts do not support the claimants' charge. The regulation is entitled to a construction of constitutional validity under the rule favoring such a construction where possible. *Harmon v. Brucker,* 355 U.S. 579 (1958). The claimants therefore are not excused from their duty to exhaust their administrative remedies, which were available, adequate, speedy and regularly invoked by others.

I

The regulation under attack is *not* unbending. It does not rigidly withhold assistance while the six month absence is running. Instead, it expressly authorizes *immediate* assistance at any time after application if the absence is actual and bona fide and if the need meets the uniform standards. Its flexibility is apparent on the record. Many applicants—including some of the claimants—received AFDC benefits within three months after separation.

"Actual and bona fide absence" simply articulates the kind of absence which must appear from the facts in every dependent child case involving desertion or separation of a parent. Some finite duration of time must precede a determination of such absence. In separation or desertion cases, it cannot be adjudged as actual and bona fide the instant it begins. But aid is frequently granted, as the record proves, long before the six month period expires.

The "exceptional circumstances of need" phrase in the regulation creates no conflict with § 406(a) of the Social Security Act or HEW regulations. The state statutes and

published guidelines impose uniformly the same standards of need for all dependent children, including those within the ambit of Regulation 2-402(b). Therefore, the phrase means simply "need" and invites no discrimination among children. And no discrimination is practiced.

The policies and practices under the regulation are equally free of any constitutional or federal infringement. They require neither an invariable six month absence nor an earlier suit for divorce or legal separation as a condition for requesting or obtaining aid. And the record so shows. Thus vanishes the foundation for the claimants' additional charges of invasion of privacy and interference with marriages.

In their pleadings the claimants made no complaint about utilization of Township Trustees for instant assistance pending county welfare department determination of absence and need. Only in their brief here do they for the first time voice such an objection. They are now too late. And in any event, such interim use of those sources of benefits brought the claimants prompt help, not harm.

II

With no violation of their constitutional and federal rights, the claimants have no excuse for bypassing the administrative remedies which the state offered them. These remedies are shown not only to be regularly enlisted by other applicants and recipients but also to be easily invoked, swift, adequate and fair. They were safeguards built into the structure of the state and county welfare systems.

The state by both statute and regulation held out to every applicant and recipient the right of appeal from

the county department decisions—whether based on a denial of the right to file, a denial of aid, a belief that civil or constitutional rights have been violated, or a feeling that policies are not reasonable or equitable and adversely affect the person—to the state department, and thence if still displeased, to the State Board of Public Welfare for personal hearing. No claimant availed herself of these rights.

Bare allegations of invalidity of the regulation, and bare allegations that its application contravened constitutional or federal rights, do not alone excuse the claimants' disregard of those administrative remedies.

III

As this Court has lately said, the problems presented by complaints such as this one are not the business of this Court. *Dandridge v. Williams*, 397 U.S. 471 (1970).

If the claimants prevail here, the federal courts will in effect become the tribunals for administrative remedies and the ultimate welfare administrators for each dissatisfied applicant.

The federal courts should not be required to substitute their discretion for the expertise of trained administrators.

ARGUMENT

I

NO SUBSTANTIAL FEDERAL OR CONSTITUTIONAL QUESTION INVOLVED

As the claimants concede, there is no substantiality to an asserted constitutional or federal question when the "question is obviously without merit." (Appellants' Br. 13). Here, the complaint purports to allege facts creating a substantial constitutional or federal question. However, the evidence in the hearing before the lower court failed to support those allegations, and "substantiality" disappeared. It follows, therefore, that neither the regulation under attack nor the practices in applying it create a substantial constitutional or federal question, and in effect the court so found.

A

Regulation Valid on Its Face

Two reasons sustain the validity of Indiana Public Welfare Regulation 2-402(b). First, it provides flexibility in the concept of continued absence. Second, it applies only uniform standards of need. The defendant Stanton here deals with each in that order.

Flexible Measure of Continued Absence

The regulation does not necessarily withhold assistance while awaiting expiration of the six month period of absence. There is no rigid six month waiting period under the Indiana regulation to make it unreasonable, unconstitutional

or inconsistent with the Social Security Act. The regulation, instead, authorizes immediate assistance at any time after application if circumstances of need exist and if the absence is actual and bona fide. Surely, this is not unreasonable. As stated by the three-judge court in rehearing *Damico v. California*, 2 Pov. L. Rep. § 10,478 (N.D. Calif. 1969):

> "We hold that under the Social Security Act, the state may not deny AFDC benefits to otherwise eligible children by means of a conclusive presumption that an absence is not 'continued' before the expiration of three months. In so ruling, we do not hold that the state may not set up a reasonable time period as a rebuttable evidentiary guide to determine what constitutes a 'continued absence' in the absence of other factors. The state correctly argues that 'continued absence' cannot be attained in an instant but must endure for some period."

"Continued absence" is a phrase that state Regulation 2-402(b) inherited through descent from the Social Security Act (42 USC 606(a)) which employs the identical phrase in defining a dependent child. That Act contains no definition of "continued absence" and the pertinent HEW regulation offers no substitute for an exercise of judgment by a caseworker or other administrative agent. The Indiana regulation in its flexibility authorizes this exercise of judgment in the express exception to the six month period. All that is required is a finding that the absence is actual and bona fide. The sole function of the six month yardstick is to provide a *conclusive* finding of continued absence when other factors do not reveal sooner that the absence is actual and bona fide. That the flexibility inherent in the regulation is frequently applied clearly appears from the record in this case. (App. 52, 176, 187, 192).

This differentiates the regulation here from the statute in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the regulation in *King v. Smith*, 392 U.S. 309 (1968), both relied upon by the claimants.

Shapiro involved welfare awards rigidly conditioned on completion of a one year residence in the state. The decision, however, rested, not upon the distinction made between eligible and ineligible applicants as a per se invasion of some fundamental interest, but upon the resulting impingement on the constitutionally protected right to travel between states. Moreover, *Shapiro* found nothing allowing flexibility in application of the residency requirement regardless of welfare needs.

In *King*, the Court properly struck down a capricious definition of "parent" in Alabama's AFDC regulation. Not only did the Alabama provision assault humane sensibilities by using the denial of benefits to needy children as a weapon to enforce a preferred morality in the conduct of the mother. It also contained a rigidity that allowed no administrative discretion to award benefits to children of mothers upon whose proclivities the regulation frowned. The Alabama denial of benefits to the class of children with erring mothers while granting benefits to the class with mothers not given to forbidden conduct was, the defendant feels, a callous denial of equal protection of the laws.

The case at bar involves no such circumstances.

Dandridge v. Williams, 397 U.S. 471 (1970) teaches that a state need not shackle itself by absolute negation of discreation and judgment, but instead may create classifications of persons and of circumstances reasonably appropriate to the social end. There, Maryland had prescribed ac-

ceptable standards of AFDC benefits per child, but had also fixed a maximum for any one family. The challenge rested on a claimed denial of equal protection because children of the largest families were denied the same amount per capita which children of smaller ones received. The logic by which the Court reached its decision is so controlling here that at the risk of prolixity the defendant repeats it:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426.
>
> • • •
>
> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain pro-

> cedural safeguards upon systems of welfare administration, Goldberg v. Kelly, ante. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients: Cf. Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585; Helvering v. Davis, 301 U.S. 619, 644. The judgment is reversed.

As in *Dandridge*, so here. The Indiana regulation, imperfect perhaps, nevertheless is flexible, reasonable, free from absolutes and without rigidity. It allows needed benefits to needy children regardless of the duration of absence, when it constitutes "continued absence" as the facts of each case may show. No continued absence can be determined instanter. It must endure for some measurable period of time. Hence, it is fallacious for the claimants to argue that a duration of time, inescapably necessary to determine "continued absence", creates per se an unconstitutional classification of children simply because a maximum limit is fixed for the duration.

The Indiana regulation consists with both the Social Security Act and the federal regulations thereunder. For the Indiana regulation does not impose an unvarying minimum period of absence. Nor order a denial of benefits where that period is not attained. To the contrary, the regulation sets a *maximum* bracket of time, and tells the county department that it may exercise judgment as to the actuality of absence upon the facts of the case within that bracket but that beyond the maximum time the presumption of continued absence is conclusive. Thus, the six month period is actually a safeguard in all of those cases where other facts may be obscure.

This differentiates the instant case from *Doe v. Hursh*, 2 Pov. L. Rep. § 11,753 (D. Minn. 1970) and *Damico v.*

California, 2 Pov. L. Rep. § 10,478 (N.D. Calif. 1969) upon which the claimants stand.

In *Doe*, the Minnesota statute created an *irrebuttable* presumption that separation for less than three months was not "continued absence from home." No evidence was permitted by which this presumption could be overcome. Children were ineligible even if the absent parent had left permanently or had been ordered out of the house in a divorce action. In fine, the period of absence was the *minimum* with no exceptions. The Indiana regulation contains no such rigid prohibitions, but instead flexibly permits immediate assistance.

Damico dealt with an arbitrary "sue or starve" regulation. It prohibited any aid prior to three months of continued absence unless legal action was taken to terminate the marriage or the parent was deported or incarcerated. And it conclusively presumed that otherwise the absence was not "continued" until the passage of the three month period. The "conclusive presumption" which flawed the California regulation is missing from the Indiana regulation. This clearly differentiates the two.

Neither the Social Security Act nor the HEW regulations forbid state regulations or administrative practices which define continued absence in maximum terms but hedged by such exceptions as the Indiana regulation contains. "HEW's recommendation" that time specifications as definitions of continued absence be eliminated as soon as the development of administrative controls and staff skills permits is nothing but a recommendation.

As the federal courts judicially know, the states participating in the AFDC program are required to submit their AFDC plans for the approval of the Secretary of

Health, Education and Welfare; and those plans must conform with the several requirements of the Social Security Act and with the rules and regulations promulgated by HEW. Such approval and conformity are conditions for the grant of federal matching funds. Indiana has long participated in the program and received matching funds. Yet there is no evidence of any indication from HEW that Indiana Regulation 2-402(b) is inconsistent with the Social Security Act.

Uniform Standards of Need

The "exceptional circumstances of need" phrase in the Indiana regulation creates no conflict with § 406(a) of the Social Security Act. The phrase must be viewed within the frameword of the controlling state statute, as well as its application. Burns Indiana Statutes Ann. § 52-1241. That statute demands uniformity in standards of needs. In obedience, State Form DPW 350 sets down the detailed categories and measurements of need for a dependent child with no distinctions among children. (App. 58, 59).

The regulation under attack was promulgated by the very state agency which applies it in practice. In addition to what the statute imposes, the true test of the phrase is not what it might convey in the abstract, but rather what consequences flow from its practical application by the same agency. The administrative body responsible for both adoption and enforcement of a regulation is the best body to describe its effect and its true construction. Such a body is the recognized source of experience and informed judgment to which courts and litigants alike have resorted for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Federal Maritime Board v. Isbrandtsen* 356 U.S. 481 (1958).

In this case the chief supervisor of the family services division of the Marion County Welfare Department attested to the *uniform standard* of need utilized in *all* applications—

"Q. How is this study of need determined?

"A. There is a set standard for requirement for the State of Indiana, it is used State Wide as to what a family of a certain size needs monetarilly to maintain a standard of living compatible with decency and health, the standard is applied objectively to everyone who applies for welfare." (App. 49)

* * *

"Q. Mr. McGruder, with respect to a separation of the parties or I should say in absence of one of the parents, not a continued absence, I'm talking about, say, death of a parent or absence of a parent where it is more than six months, what are your standards of need with respect to an obligation [application] filed in that type of situation?

"A. The same standard need would apply, that applies to all applicants for welfare.

"Q. In other words, your standard of need for those of less than six months separation would be the same as it is for more than six months?

"A. Yes." (App. 51).

In the same regard, the defendant Stanton likewise answered—

"Q. Do you apply, Marion County Department of Public Welfare apply any different standard of need as to those cases where the parents have been separated for less than six months, as opposed to those where separation is over six months?

"A. No, we do not, it is the same standard."

(App. 195).

Abiding by the above cited rule of construction of administrative regulations, the correct practical interpretation of "exceptional circumstances of need" is simply that it invokes the same standards of need which obtain in the other categories of the AFDC program in Indiana.

Fair and reasonable construction of the regulation under attack therefore compels the conclusion that it is entirely valid and free from any impingement upon either constitutional or federal rights. And this becomes an even more compelling conclusion when the application of the regulation is next considered.

B.

APPLICATION OF REGULATION

The major attack on the application of the regulation concerns divorce and legal separation.

No Divorce or Separation Requirement

The claimants allege in their complaint, and here charge, that the Marion County Welfare Department has a policy or practice of denying within the six month period the right to complete and file an application, or denying assistance, unless the mother files for divorce or legal separation.

They are utterly wrong. This claim is refuted by the finding and decision of the three-judge federal court and the evidence which bottoms the finding. Since the court found no substantial constitutional question, it neces-

sarily follows that the court found against the claimants on their charge and their evidence of such a policy or practice.

As to the allegations that the claimants were denied the right to file, the finding and decision is buttressed by such evidence as the following. Of the five claimants who testified, four admitted that they had no trouble filing an application. (App. 121, 132, 140, 151). The remaining claimant, Lucy Hall, testified that she filed an application two days after her husband's departure and started receiving benefits less than three months later. (App. 163). Claimant Enoch started receiving benefits less than two months after she and her husband separated. (App. 151).

The defendant Stanton, the witness most certain to know the County's policy and practice, denied positively that any divorce or legal separation requirement exists as the following testimony proves: (App.191-192).

"Q. Do you have any rule or regulation or practice or policy with respect to the necessity of a person to file for divorce before he can file an application?

"A. We have no such requirement.

"Q. How about with respect to filing a divorce and receiving any assistance?

"A. We have no such requirement, that requires filing of divorce in order to receive assistance or make application for assistance.

"Q. How about with respect to filing application with respect to separation?

"A. We do not require a filing of separation on, or indication or statement of separation in order to make application or to receive assistance."

Ernest McGruder corroborates Stanton's testimony in these words: (App. 50).

> "A. There is no policy in the intake department of Marion County Welfare where one must file for divorce. That would have no bearing on whether or not they can file an application for assistance.
>
> "Q. How about filing for a legal separation?
>
> "A. That neither."

So does caseworker Hartzler. (App. 187).

> "Q. Have you ever told an individual, as you recall, they would have to file for divorce before they could file an application?
>
> "A. Never.
>
> "Q. Before they could receive any assistance?
>
> "A. Never.
>
> "Q. How about filing for legal separation?
>
> "A. Never."

The experience of claimant Hall and witnesses Watkins, Blankenbackler and Smith puts to rest the claimants charge. These applicants *all* received AFDC benefits less than three months after separation, yet *none* sought divorce or legal separation. (App. 163, 169, 170, 172).

From those facts, where does there emerge any pattern of requirement for divorce or legal separation suits before either applying for or receiving AFDC benefits?

In truth, neither policy nor practice requires the filing of a divorce or legal separation action as a condition for the application or the award of benefits. Filing for separation or divorce is but one of the many alternative proofs

which are accepted in the determination of "continued absence." Such a suit is *not* required. It is simply persuasive evidence if undertaken.

C.

INTERIM BENEFIT SOURCES

The claimants for the first time are challenging county welfare department referrals to the Township Trustee. Their complaint makes no mention of this. Clearly it is unfair for the claimants to create this issue for the first time in a brief to this Court. However, their charge is easily answered.

The claimants rest their challenge to the role of the Township Trustee on an unfortunate misreading of the facts of record. To illustrate, they claim in their brief that the defendant Stanton said "the primary responsibility for the first six months of a separation belongs to the Township Trustee. In his opinion, need and deprivation under the federal Act arise only when the Trustee stops giving assistance." (Appellants' Br. 21). Stanton said no such thing.

What Stanton really said is this: Within 30 days after the application, an applicant receives her check or her notice of denial. As far as "immediate" relief is concerned, numerous sources are available including the Township Trustee. (App. 194-195). By statute, he explained, the county welfare department is not the agency to provide "immediate" assistance. (App. 195).

The Township Trustee can provide this immediate assistance in various forms. (App. 195). He bears the primary responsibility "for the short term or first part of

the need situation," until there are signs that the separation is bona fide. (App. 204-205).

These signs, of course, can develop at any time within the first six months of separation.

"Immediate" assistance in the context of Stanton's testimony means *instant* assistance, continuing until AFDC aid is granted, or the need ends. Burns Ind. Stat. Ann. § 52-1243 (1964); Indiana State Board of Public Welfare Regulation 2-404, Burns Ind. Admin. Rules and Regs. (52-1244)-1 (1969).

This was clarified by chief supervisor Ernest McGruder (App. 67):

> "Q. Mr. McGruder, under state law, as it now exists, there is no matter [manner] whereby a person can go into the Welfare Department and receive a check and walk out on that same day, is it not true the Board must act and grant assistance before a check is mailed out?
>
> "A. To my knowledge, yes.
>
> "Q. In other words, the State of Indiana does not have a program like some states whereby the Welfare Department fulfills the need of emergency assistance for today for tonight's mean [meal], is that correct?
>
> "A. Right.
>
> "Q. Who does that in the State of Indiana?
>
> "A. Township Trustees."

The record reveals that the Township Trustee has a statutory duty to provide immediate assistance pending the processing of AFDC applications. (App. 195). In fact, of the five claimants who testified, all except one were

receiving interim assistance from the Township Trustee. The one exception, claimant Steele, admitted that she had no problems as far as need was concerned. (App. 141, 143). These facts refute the claimants' dramatic description of their plight and illustrate that relief in Indiana is available during any interim period while waiting AFDC assistance. (Burns Ind. Stat. Ann. § 52-144, -148).

The claimants inveigh against welfare department referral of applicants to the Township Trustee. Yet they make no complaint of similar referral to charitable and religious sources of interim aid. The county director in these referrals is simply performing a compelling humanitarian service.

II

FAILURE TO INVOKE OR EXHAUST ADMINISTRATIVE REMEDIES

Whether this federal suit was premature hinges on the answer to two questions—first, were state administrative remedies readily available, adequate, speedy, and easily invoked; and second, if so, were the claimants obliged on the record of this case to exhaust those remedies before soliciting the jurisdiction of the federal judiciary?

The answer to both is yes.

A

The Remedies Meet the Tests

The nub of the alleged grievance is that each claimant was denied the right to file an application or denied a grant of assistance; and that each denial was based either on an unyielding requirement that the mother be separated

from her husband for six months or on an unwritten requirement that she must file for divorce or legal separation. Those two grounds, and no others, are asserted as the very foundation of this lawsuit. (Appellants' Br. 6).

Effective administrative remedies are provided by statute and regulation of the state for both of those alleged grievances. Burns Ind. Stat. Ann. § 52-1246 (1964); Indiana State Board of Public Welfare Regulation 2-113 (Appellants' Br. 3a, 4a).

Every person seeking AFDC help, including every claimant here, is given the right to appeal to the state department of public welfare, and then to the state board itself if, inter alia—

(a) The county department refuses to accept an application for assistance;

(b) An application is not acted upon within the time limit established by the state department;

(c) An applicant or recipient is dissatisfied with the amount of the award;

(d) An application is denied;

(e) An applicant or recipient believes her civil or constitutional rights have been violated; or

(f) An applicant or recipient believes that the state or county department policies are not reasonable or equitable and that they affect her adversely.

Every applicant is informed of the right of appeal by printed information on the notice of decision by the county department. (App. 52). Each applicant not only is notified in writing of her right to appeal but also must be advised of such right with each grant, denial or modification of award. (Appellants' Br. 4a).

The appeal is scheduled within a week or two and decided approximately two weeks thereafter. (App. 197). If the person appealing is not satisfied with the state department decision, then the state board of public welfare will review her case personally if a specific request for such review is made within ten days following receipt of the appeal decision. (Appellants' Br. 7a). Again the person appealing is notified of this right. (Appellants' Br. 7a).

Fair hearings are commanded. (Appellants' Br. 3a, 5a, 6a, 7a).

Of utmost importance to this lawsuit is the integration of administrative appeal into the application process itself. Upon receipt of an appeal, the state department immediately writes the applicant, acknowledging the request for appeal and setting a date and place for the hearing. A copy goes to the county department. Immediately upon receipt of the copy, the county department must review the applicant's situation and, if an adjustment of the appealed action is indicated, must advise the applicant and the state department accordingly within two weeks after receiving notice of the appeal. (Appellants' Br. 4a, 5a). This means that initial denial of an application is not a final county department decision. Applicants do not complete the procedure within the county department until, by *starting* an appeal, they cause the county department automatically to reassess the application.

In conclusion, the defendant submits that no reasonable person can seriously question the availability, adequacy, swiftness and economy of the administrative remedies held forth to all applicants and recipients under the welfare program.

B.

CLAIMANTS HAVE NOT EARNED FEDERAL JURISDICTION

Despite those administrative remedies, the claimants failed even to set the administrative procedure in motion by giving simple notice of appeal. No claimant even took that initial step of appeal which would have gained for her an immediate county department reconsideration. Indiana State Board of Public Welfare Regulation 2-113(b). (Appellants' Br. 4a).

The claimants argue that the administrative remedies can be ignored and bypassed because the complaint asserts violations of civil and constitutional rights. And they apparently believe that total failure of proof of such violations affects not at all their standing in the federal court.

With this the defendant, of course, does not agree. Nor did the lower court.

That administrative remedies which meet the test of adequacy and efficacy must be exhausted before resort to federal judicial relief has been the constant rule. *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947).

It is true that plaintiffs in recent civil rights actions have been excused from the exhaustion requirement—but under special conditions. *Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416 (1967); *Houghton v. Shafer*, 392 U.S. 639 (1968); and *King v. Smith*, 392 U.S. 309 (1968). However, the defendant submits that not one of these decisions presented a situation

where there was a speedy, adequate, viable and practical administrative remedy as is available to the claimants in this case.

Thus, *Monroe v. Pape* did not involve any consideration of an administrative remedy. It simply decided that the victim of indefensible police abuse could come into federal court without first seeking state court action. The present appeal deals only with viable administrative remedies. The defendant does not question the existence of concurrent judicial remedies. But that issue does not arise here.

McNeese v. Board of Education, a school segregation case, turned on the undisputed fact that the official to whom administrative appeal would go had no power to grant relief but could only request the state attorney general to bring suit. Moreover, the administrative remedy could not be initiated without the signatures of the lesser of fifty residents or 10% of the school district. That case therefore involved an administrative remedy which was futile—and which might become merely the first step toward an inevitable lawsuit. Yet the court did not throw the exhaustion rule out the window. Its precise holding was that "when federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." (373 U.S. at 676).

Nothing in the state administrative remedies described in the present case can rationally be called "tenuous protection."

In *Damico v. California* the Supreme Court did not concern itself with the availability or the adequacy of the administrative remedy. But behind the decision appears a conclusive presumption which prevented an eligible child from receiving benefits within the first three months of

absence unless the mother sued for divorce or the absent father was deported or incarcerated—and which therefore afforded no room for administrative remedies. Hence, in *Damico* any administrative remedy would have been futile.

In *Houghton v. Shafer* the facts are patently different from those here. The appeal there went to the state attorney general, who was charged with strict enforcement of the entire prison correctional system, or to the commissioner of correction or his deputy, or to the prison superintendent, who told the prisoner-plaintiff to "leave well enough alone." The Supreme Court expressly found that in this circumstance administrative appeal would be a futile gesture.

In *King v. Smith* involving Alabama's "substitute father" regulation, the Supreme Court decided that a plaintiff proceeding under the Civil Rights Act and a "sufficiently substantial constitutional challenge" need not exhaust the administrative remedies. But in the case at bar, as shown earlier in this brief, the constitutional challenge is not sufficiently substantial to excuse the failure to exhaust the administrative remedies offered by the Indiana regulation and statute. Moreover, *King* describes no state administrative remedy which could dispose of the obvious constitutional issue there presented. Here, substantial constitutional questions do not exist, and the state administrative remedy is available and adequate to handle the grievances in the complaint.

Those five cases do not deny the exhaustion doctrine. This is confirmed by the opinions in *Eisen v. Eastman*, 421 F. 2d 560, (2d Cir. 1969) and *Metcalf v. Swank*, 305 F. Supp. 785 (N.D. Ill. 1969). *Eisen* recognized the difference between administrative remedies and judicial remedies in discussing the need for exhausting the former but

not the latter before coming into the federal court. The judges in *Eisen* did not believe that the Supreme Court "has decided that plaintiffs in such cases may turn their backs on state administrative remedies and rush into the federal forum whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction." (421 F. 2d at 569). Likewise, the court in *Metcalf* emphatically believed that the decisions could not be read as giving civil rights plaintiffs the unqualified right to bypass state administrative remedies. (305 F. Supp. at 788).

There being no substantial constitutional questions and no violations of the Civil Rights Act, and there being administrative remedies available, adequate and speedy, the claimants here had no right to bypass and ignore the administrative remedies provided by the state of Indiana.

III

CONCLUSION

This case contains no constitutional or federal challenge of sufficient substance to justify the overthrow of the long established and sound rule that litigants should first exhaust their administrative remedies. It is presumptuous for the claimants here to bypass their administrative remedies on the assumption that their efforts would be fruitless.

The very foundation of the exhaustion rule is the wisdom of giving to an administrative agency accused of error a fair opportunity to make its own corrections. The effect of an exception to the rule in cases such as this will be marked by a vast increase in the federal case load—and even more worrisome, the substitution of federal judges

for state administrators in the day-to-day operation of welfare systems.

For these reasons as well as those advanced and supported earlier in the defendant's brief, the findings and judgment of the lower court should in all things be affirmed.

Respectfully Submitted,

ROBERT W. GEDDES

HAROLD W. JONES
SMITH AND JONES
2470 Indiana National Bank Tower
Indianapolis, Indiana 46204
(317) 632-4402

Attorneys for Appellee Wayne Stanton

Of Counsel:

CARL J. MEYER
RHOADS, LINDER, MEYER AND BUEHL
136 East Market Street
Indianapolis, Indiana 46204
(317) 632-4402

APPENDIX

Indiana Statute on dependent children—amount of assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 72, p. 12; as amended Acts 1967, Chap. 270, § 1, p. 799 [Burns Cumulative Pocket Supplement, Vol. 10, Part 1, § 52-1241]:

52-1241. Dependent children—Amount of assistance.—The amount of assistance which shall be granted for any dependent child shall be determined by the county department with due regard to the resources and necessary expenditures of the family and the conditions existing in each case and in accordance with the rules and regulations made by the state department, and shall be sufficient, when added to all other income and support available to the child, to provide such child with a reasonable subsistence compatible with decency and health, taking into consideration all needs essential to the well-being of the child. The total amount paid to any dependent child other than for medical expense, for any calendar month, shall not exceed fifty dollars [$50.00], and the total amount paid to the person essential to the well-being of such dependent child other than for medical expenses, for any calendar month, shall not exceed fifty dollars [$50.00]. The total amount paid to one [1] dependent child and to the person essential to the well-being of such dependent child other than for medical expenses, for any calendar month, shall not exceed one hundred dollars [$100]. If there is more than one dependent child or children in the same home, the total amount paid, other than for medical expense, for any calendar month, shall not exceed twenty-five dollars [$25.00] for each additional child or children; and if an incapacitated father of such children is living in the home, an amount not to exceed twenty-five dollars [$25.00] may be paid for the benefit of such incapacitated father. Provided further, That when any such

dependent child or such children or the person or persons essential to the well-being of such child or children are found to be in need of medical care, payment for any necessary care may be included in the monthly award to the recipient, even though payment for such care may increase the amount of the monthly award in excess of the maximum amounts otherwise allowed by this section or payment for such care, regardless of any maximum monthly limitations in this section, may be made directly to the person, corporation, association, institution, or agency furnishing such care. Such direct payments may be made during the lifetime of the child either before or after it reaches the maximum age for dependent children or after the death of such child, for care furnished before the child reaches the maximum age for dependent children. Each county department shall establish and submit for review and approval by the state department a plan for furnishing necessary medical care, adjusted to the medical facilities and the needs in the county.

Indiana statute on dependent children—application for assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 73, p. 12 [Burns Indiana Statutes Annotated 1964 Repl. § 52-1242]:

52-1242. Dependent children—Application for assistance.—Application for assistance for a dependent child under the provisions of this act [chs. 10-14 of this title] shall be made to the county department of the county or district in which the dependent child resides. The application shall be in writing, or shall be reduced to writing, and shall be made in the manner and upon the form prescribed by the state department. The application shall be made and verified by the oath of the parent or guardian of or other person standing in loco parentis to such dependent child. Every such application shall contain information as to the age and residence of the child and such other information

as may be required by the rules and regulations of the state department. One [1] application may be made for several children of the same family if they reside with the same person.

Indiana statute on dependent children—investigation. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 74, p. 12 [Burns Indiana Statutes Annotated 1964 Repl. § 52-1243]:

> **52-1243. Dependent children — Investigation.** — Whenever the county department shall receive a notification of the dependency of a child or an application for assistance, an investigation and record shall promptly be made of the circumstances of such child to ascertain the dependency of the child, or the facts supporting the application made under the provisions of this act [chs. 10-14 of this title], and such other information as may be required by the rules of the state department. The investigation shall include a visit to the home of the child and of the person who will have the custody of the child during the time assistance is granted.

Indiana statute on dependent children—granting of assistance. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 75, p. 12 [Burns Indiana Statutes Annotated 1964 Repl. § 52-1244]:

> **52-1244. Dependent children—Granting of assistance.**—Upon the completion of such investigation, the county department shall decide whether the child is eligible for assistance under the provisions of this act [chs. 10-14 of this title] and shall determine the amount of such assistance and the date on which such assistance shall begin. In determining the amount of such assistance, due account shall be taken of any income or property of the child and of any support which he may receive from other sources. The county department shall make an award which, including any

subsequent modification thereof, shall be binding upon the county and shall be complied with by the county until such award or modified award is vacated. The county department shall notify the applicant and the state department of its decision in writing. Such assistance shall be paid monthly to the recipient upon warrant of the county auditor, from the county welfare fund, upon a verified schedule of the recipients and the amount payable to each such recipient, prepared and verified by the county director, in accordance with the awards made by the county board. All schedules shall be filed in the form prescribed by the state department.

Indiana State Board of Public Welfare Regulation 2-404, Burns Ind. Admin. Rules & Regs. (52-1244)-1 (1969):

(52-1244)-1. Payment of assistance to dependent children and medical care.—(a) All applications for assistance to dependent children shall be acted upon by the county board of public welfare or by the county director of public welfare upon the authority of the county board in sufficient time to permit payment of approved awards to be made within thirty [30] days following the date of application. Such awards shall be due and payable either on the first or sixteenth day of the month and shall be effective the first day of the month. Payment shall be made for necessary medical care furnished on or after the first day of the month in which the application was made. No award of assistance, except for necessary medical care shall be for any period of time other than for a full month and shall not exceed the lawful monetary maximum.

All changes of award of assistance to dependent children by the county board or the county director upon the authority of the county board shall be effective, due and payable on the first day of the month following approval.

(b) When a recipient who is otherwise eligible has resources which meet his needs temporarily or meet his need with the exception of existing medical needs, the monetary amount of which cannot be determined, the county department of public welfare shall change the assistance award to an amount "to be determined." When the extent of need is established, the award shall be changed to a definite amount.

(c) Payment of claims for medical services furnished recipients shall be made in accordance with the county department's medical plan. The effective date for the payment for such medical care shall be the first of the month following board action.

(d) Each county medical plan shall be construed to include, as a necessary expenditure for medical care, payment of the enrollment fee, or premiums, enabling parents 65 years of age or over in assistance to dependent children cases receiving money payments otherwise eligible to be insured for medical services under Part B [F.C.A., tit. 42, §§ 1395j-1395w] of Title XVIII. Such fees or premiums shall be paid to the bureau of health insurance of the social security administration by the state department of public welfare.

(e) On and after July 1, 1966, each county medical plan shall be construed to include as a necessary expenditure, a fee schedule for parents 65 years of age or over in assistance to dependent children cases insured under Title XVIII [F.C.A., tit. 42, §§ 1395-1395kk] with maximum limitations for medical services determined pursuant to the rules adopted by the department of health, education, and welfare for the federal government's payment for medical services under Title XVIII.

(f) Claims for medical services furnished to parents 65 years of age or over in assistance to dependent children cases insured under Parts A [F.C.A., tit. 42, §§ 1395c-1395i] and B [F.C.A., tit.

42, §§ 1395j-1395w] of Title XVIII shall not be submitted for payment directly by the person, corporation, association, institution or agency furnishing such services to the carrier designated by the state department of public welfare. The designated carrier will process and pay all such claims and bill the state department of public welfare for that portion not payable by the federal government under the provisions of Parts A and B of Title XVIII.

(g) The state department of public welfare upon the receipt of proper billings from the bureau of health insurance of the social security administration and the designated carrier will make the necessary payment from state funds. The county department of public welfare's share of such payments will be adjusted by the state department in the calculation of monthly assistance reimbursement to the county department.

Indiana statute on dependent children—certificates. Indiana Acts 1936 (Spec. Sess.) Chap. 3, § 76, p. 12 [Burns Indiana Statutes Annotated 1964 Repl. § 52-1245]:

52-1245. Dependent children—Certificates.—When the assistance is granted to any dependent child under the provisions of Part 3 [§§ 52-1201—52-1279] of this act, the award so made, designating the name and residence of the recipient, the amount of the award, the date when the assistance to the recipient is to begin, and such other facts as the state board shall prescribe, shall be entered on a certificate, the form of which shall be prescribed by the state board. Four [4] copies of such certificate shall be prepared, each certificate shall bear the impress of the seal of the department, and one [1] copy thereof shall be retained by and filed in the office of the county department, one [1] copy shall be filed with the state department, one [1] copy shall be filed in the office of the county auditor and one [1] copy shall be given to the recipient.

Indiana statute on Dependent children—appeal to state department. Indiana Acts 1936 (Spec. Sess.), Chap. 3, § 76, p. 12 [Burns Indiana Statutes Annotated 1964 Repl. § 52-1246]:

> **52-1246. Dependent children—Appeal to state department.**—The county department shall at once report to the state department its decision upon each such application for assistance to a dependent child. If any such application is not acted upon by the county department within a reasonable time after the filing of the application, or if such application is denied, or if assistance previously granted is modified or revoked, the applicant may appeal to the state department in the manner and form prescribed by the state department. The state department shall, upon receipt of such an appeal, give the applicant an opportunity for a fair hearing thereon. The state department may also, upon its own motion, review any decision of a county department, and may consider any application upon which a decision has not been made by the county department within a reasonable time. The state department may make such additional investigations as it may deem necessary, and shall make such decision relative to the granting of assistance and the amount of the assistance to be granted as, in its opinion, is justified and in conformity with the provisions of this act [chs. 10-14 of this title]. All decisions of the state department made in conformity with the terms of this act shall be binding upon the county department involved and shall be complied with by such county department and shall have the same force and effect as decisions of the county department from which appeals are not taken.

Indiana statute on Township Trustee as overseer of poor. Indiana Acts 1935, Chap. 116, Article 1, p. 432 [Burns Indiana Statutes Annotated 1964 Repl. § 52-144]:

52-144. Poor relief — Township trustees — Overseers.—The township trustees of the several townships of this state shall be ex officio the overseers of the poor within their respective townships, and shall perform all duties with reference to the poor of their respective townships that may be prescribed by law. Every township trustee shall, in discharging the duties prescribed in this act [§§ 52-144—52-176, 52-177—52-181], be designated an overseer of the poor.

Indiana statute as to duties of Trustee and service to be rendered. Indiana Acts 1967, Chap. 251, Article 1, p. 655 [Burns Cum. Pocket Supp., Vol. 10, Part 1, § 52-148]:

52-148. Duties of trustees—Service to be rendered.—The overseer of the poor in each township shall have the oversight and care of all poor persons in his township so long as they remain (in) a charge, and shall see that they are properly relieved and taken care of in the manner required by law. He shall, in cases of necessity, promptly provide medical and surgical attendance for all of the poor in his township who are not provided for in public institutions; and shall also see that such medicines and/or medical supplies and/or special diets and/or nursing as are prescribed by the physician or surgeon in attendance upon the poor are properly furnished. The township trustee may, in cases of necessity, authorize the payment from township poor relief funds for water, gas and electric services, including the payment of delinquent bills for such services, when necessary to prevent their termination or to restore terminated service. He may, in cases of necessity, authorize the payment from township poor relief funds for lunches furnished to any child by the school in which the child attends classes, whenever the parent or other person responsible for such child is found to be financially unable to pay for such lunches. As a means of determining financial ability to pay for school lunches, the township trustee shall have authority to require the parent

or other person responsible for the child to subscribe to an affidavit as provided for in sec. 9 [§ 52-152] of this act and he may make an investigation pursuant thereto, or, he may accept a certified statement as hereinafter provided for from either the director of the county department of public welfare of the county in which the child resides or the attendance office of the school corporation in which the child attends classes. The certified statement shall convey to the township trustee the information that the person making the certificate has made diligent inquiry into the financial status of the parent or other person responsible for the child and that to the best of his knowledge and belief, the parent or other person responsible for the child is not financially able to pay the cost of the lunches furnished by the school.

Indiana statute on temporary aid by Township Trustee. Indiana Acts 1935, Chap. 116, Article 7, p. 432 [Burns Indiana Statutes Annotated 1964 Repl. § 52-150]:

52-150. **Temporary aid — When.** — Whenever an overseer shall ascertain by investigation that any poor person or persons or family require assistance, he shall furnish to them such temporary aid as may be necessary for the relief of immediate and pressing suffering; before any further final or permanent relief in any case is given, the overseer shall consider whether distress can be relieved by other means than an expenditure of township funds.

Indiana State Board of Public Welfare Regulation 2-113.

Reg. 2-113. Appeals.

(a) If the county department of public welfare refuses to accept an application for any type of public assistance as provided for in the Welfare Act of 1936 [Burns' Stat., §§ 52-1001 — 52-1417], as amended; or any other law pertaining to public

assistance; or if an application is not acted upon within the time limit established by the state department of public welfare and approved by the department of health, education, and welfare; or if an applicant or recipient is dissatisfied with the amount of the award; or if an application is denied; or if an applicant or recipient believes his civil or constitutional rights have been violated; or if an applicant or recipient believes that the state or county department's policies, including work requirements, are not reasonable or equitable and that these affect him adversely; or if the applicant or recipient believes that restrictions have been placed on his assistance payment that violate his right to an unrestricted money payment, the applicant or recipient may appeal to the state department of public welfare.

Such appeal shall be in writing over the signature of the applicant or recipient or person who is entitled to or who has been designated to act in his behalf and shall be filed with the county or state department of public welfare within 30 days following either the action or issue being appealed. Every applicant or recipient shall be notified of his right to appeal to the state department of public welfare at the time of his application, and concurrently with each grant, denial or modification of award.

(b) Upon the receipt of an appeal, the state department immediately will write the appellant, with a copy to the county department, acknowledging the request for an appeal and setting a date and place for such appeal hearing within three [3] weeks from the date of receipt of the request for an appeal. The county department will review the appellant's situation immediately and if an adjustment of the appealed action is indicated will advise the appellant and the state department ac-

cordingly within two [2] weeks after the receipt of the notice of an appeal.

If the appeal is based on a denial of assistance because of a state department decision regarding permanent and total disability or blindness, the appropriate staff member of the state department will review the evidence on which the original decision was based. Additional medical and/or social information may be requested for use in reviewing the original decision.

The appellant may, if he desires to do so, withdraw his request for a hearing or postpone the hearing pending any adjusting action. If not, the hearing will proceed as scheduled.

(c) If the action taken by the county department, either prior to the hearing or as a result of the decision on a fair hearing corrects a previous agency action, the effective date of the correcting action shall be retroactive to the date the original incorrect action was effective. If a delay in action on an application is being corrected, the effective date of the correcting action shall be the first of the month following the month in which action should have been taken. If action is being taken to change an award because of a reported change in circumstances, the correcting action shall be retroactive to the first of the month following the month in which the action should have been taken.

If the state department reverses its decision regarding permanent and total disability or blindness either prior to the hearing or as a result of the additional medical evidence obtained in the hearing process, the county department, or in a blind assistance case the state department, will rescind the action taken on the application and promptly approve assistance retroactively to the

first of the month following the month in which the original action was taken, if the appellant was otherwise eligible.

(d) Any fair hearing shall be held at a place convenient to the appellant in the county in which he resides and shall be conducted by an official or employee of the state department of public welfare duly designated to hold such hearings. The hearing shall be informal and shall provide an opportunity for all persons who have pertinent information to be heard promptly. The appellant may be represented by any person of his own choice, including legal counsel if he so desires. The appellant or his representative shall have full opportunity to question or refute any evidence presented by the state or county department and to examine all documents and records used at such hearing, and said departments shall have the same opportunity as the appellant.

The hearing officer, with the consent of the appellant or his representative, may continue the hearing in order to secure additional information pertinent to the case, or the appellant or his representative may request a continuance in order to obtain such information.

(e) When the issue of the appeal involves a medical determination regarding disability, incapacity of a parent, or the ability of an assistance to dependent children family member to take employment, the appellant shall be given an opportunity to obtain a new medical evaluation from a medical source satisfactory to him and to the state and county department of public welfare. Such medical evaluation shall be secured in accordance with the provisions of the county medical plan. The hearing officer will consider the medical evidence in the record presented at the hearing and may request additional medical evidence. The as-

sessment of such medical authorities will be reported in writing or by personal testimony as an expert witness for the hearing record. The medical assessment must be from a person or persons other than those involved in the original decision.

When the appeal is based on blindness or degree of vision, the supervising opthalmologist shall designate an appeal examiner and the consultant for blind assistance and eye treatment will arrange for the eye examination and report.

The results of the examination shall be provided the hearing officer and the hearing continued with the appellant being notified of such decision and his right to a further review by the state board of public welfare.

(f) Within three [3] weeks after the conclusion of a fair hearing, the person who conducted the hearing shall report his findings of fact and decision upon the hearing. Such appeal decisions will be based on the law, rules and regulations of the state department of public welfare, and officially adopted policies and shall be signed by the administrator or a designee of the administrator and/or the director of the division of public assistance. A copy of the decision shall be sent to the appellant and to the county department of public welfare within two [2] weeks of the date of receiving the report of the hearing officer. The appellant shall also be notified that the state board of public welfare will review his case personally if a specific request is received by the state department from either the appellant or the county department of public welfare within 10 days following the receipt of the appeal decision.

(g) The decision of the state department of public welfare shall be binding upon the county department of public welfare and shall be acted upon

immediately by the county director or the county board following the receipt of the decision. The effective date of the action shall be set forth in the decision.

The county department shall notify the state department within 48 hours of the action taken. Such decision of the state department does not preclude the county department of public welfare from modifying the award thereafter, under the provisions of the Welfare Act of 1936, as amended, to meet changed conditions.

Indiana State Board of Public Welfare Regulation 2-402(b):

(b) When the continued absence is due to desertion or separation, the absence shall have been continuous for a period of at least six [6] months prior to the date of application for assistance to dependent children; except that under exceptional circumstances of need and where it is determined that the absence of a parent is actual and bona fide an application may be filed and a child may be considered immediately eligible upon a special finding of the county department of public welfare setting forth the facts and reasons for such action.

Social Security Act, § 406(a), 42 U.S.C. 606(a):

§ 406(a). When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence

maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment * * *.